

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1229 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

GARASIA CHELA DHIRA

Versus

BANK OF BARODA

Appearance:

MS KUSUM M SHAH for Petitioner
Mr.Dharshan Parikh for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 23/06/2000

C.A.V. Judgment

1. Appellant-original defendant, by filing this appeal under Section 96 of the Code of Civil Procedure, has challenged judgment and decree dated April 30, 1979 passed by learned Civil Judge (S.D.), Palanpur, in

Special Civil Suit No.29 of 1973, by which judgment, a decree for the sum of Rs.12,305.00 ps with 4.1/2% interest was passed against the appellant and it was further decreed that the respondents were entitled to recover the said amount from the hypothecated and mortgaged property in order of preference.

2. The appellant had applied to the respondent-Bank for loans for purchase of oil engine and its accessories and for construction of room and to repair well situated on his agricultural lands on October 24, 1970. The respondent-Bank had sanctioned loans as applied for by the appellant for a sum of Rs.7,800 for purchase of oil engine and its accessories, Rs.5,000/- for construction of room and Rs.750.00 for repairing well on October 24, 1970. The appellant, on December 5, 1972, had executed promissory notes for Rs.7,800/-, Rs.1000/- and Rs.3000/accordingly. The appellant had also hypothecated oil engines towards security of loans taken from the respondent-Bank. The appellant had also mortgaged his land bearing No.135 on October 23, 1970 for Rs.12,000/towards loan advanced to the appellant. The suit pro-notes were demand pro-notes and the respondent-Bank was entitled to recover the same at any time. As the appellant did not pay installments as agreed to the respondent-Bank, notice dated May 9, 1973 was served on the appellant. The appellant did not give reply to the notice and, hence, the respondent-Bank had filed Special Civil Suit No.29 of 1973 to recover the following amounts:

- (i) Rs.9770.00 towards oil engine account till 31.12.1972 with interest.
- (ii) Rs.642.75 towards room account till 31.3.1973 with interest.
- (iii) Rs.968.45 towards well account, till 31.3.1973 with interest.

3. The appellant contested the suit by filing written statement Exh.22, inter alia, contending that he had not made any application for agricultural loan to the respondent-Bank as alleged in the plaint. It was denied that the respondent-Bank had advanced loan of Rs.7800/for oil engine, Rs.5000/- for room and Rs.750/- for well on October 24, 1970. The respondent further denied that he had executed promissory notes as alleged in the plaint for different amounts. The respondent also denied that, on the same day, deed of hypothecation of movable machinery in favour of the Bank was executed. The respondent contended that all the documents alleged to have been executed by him were forged and got up. The respondent further contended that he had not executed

mortgage deed on October 24, 1970 in respect of his lands bearing Survey Nos.135 for loan of Rs.12000/-. It was claimed by the appellant that, as no loan was received by the appellant, no reason had arisen for executing promissory notes for different amounts as alleged by the respondent-Bank. The appellant further claimed that he had not received notice dated May 9, 1973. The appellant averred that the true and correct facts were that he being illiterate adivasi agriculturist, was conducting agricultural operations with old method of cultivation; that in the year 1970, one Arvind S. Trivedi of Palanpur had come to his village and stated that the Government was helping Adivasi person for development of agricultural lands and he would help the appellant in procuring loan from the Bank. It was averred that relying upon representation of said Arvind S. Trivedi, the appellant had given his thumb marks on blank papers without being understood the contents thereof. It was further averred that the appellant had never gone to the Bank. The appellant further contended that, as he had not received loan amount, as represented by Arvindbhai, he had approached the Bank and gave an application to the effect that he does not want any other loan except loan for well. The appellant contended that a fraud was committed by said Arvindbhai on him and also on one Vaja Dhira and Chela Dhira of the same village, for which, enquiry was held and criminal prosecution was launched. In short, the appellant denied that he had taken any loan from the respondent-Bank; had hypothecated movable and immovable properties to the Bank against the loan advanced by the Bank to him.

4. On rival assertions made by the parties, learned trial Judge framed issues at Exh.26. To prove the case against the appellant, In-charge Officer of the respondent-Bank, Surendra Manilal Shah was examined at Exh.31, attesting witness, Parbatsing Dungersingh was examined at Exh.78; and clerk-cum-godown keeper of the respondents-Bank at its branch at Palanpur, Babubhai Shivram Patel, was examined at Exh.80. The respondent-Bank produced documentary evidence such as promissory note, deed of hypothecation, deed of mortgage of agricultural lands of the appellants, applications for loans of the appellants, notice served on the appellant demanding dues, etc.

5. On behalf of the appellant, the appellant himself examined at Exh.86. The appellant produced copy of application submitted to the General Manager, Bank of Baroda at Exh.87, copy of which was also sent to the Collector, Banaskantha. Certified copy of deposition of

the appellant recorded in Special Case No.15 of 1977 at Exh.99.

6. Learned trial Judge, on appreciation of oral as well as documentary evidence, held that; (i) it was proved that the appellant had taken loan of Rs.7800, Rs.5000 and Rs.750 from the respondent-Bank; (ii) the appellant had executed promissory notes and deed of hypothecation of his lands in respect of the amount of loan advanced to him by the respondent-Bank; (iii) the appellant had failed to pay amount of Rs.12305.00 ps due to the Bank in spite of various demands. On the basis of aboveresferred to conclusion, the learned Civil Judge (S.D.), Palanpur, passed a decree in a sum of Rs.12,305.00 ps with interest at the rate of 4.1/2% per annum from the date of the suit till realisation with costs of the suit. The learned trial Judge further passed decree of the said amount to be recovered from the hypothecated and mortgaged property in order of preference, which has given rise to filing of this appeal by the appellant.

7. Learned counsel for the appellant, Ms K.M. Shah, has taken me through the entire record and proceeding produced by the parties at the trial of the suit. Learned counsel for the appellant submitted that the appellant was a tribal and illiterate adivasi and was duped by one Arvind S. Trevedi. Learned counsel for the appellant further submitted that, in fact, the appellant had not received any amounts of loan as contended by the respondent Bank and his signatures were obtained on blank papers. Learned counsel for the appellant further submitted that promissory notes produced by the respondent-Bank were not proved as nobody had attested thumb mark alleged to have been put by the appellant on the promissory notes. Learned counsel for the appellant further contended that presumption under Section 118(g) of the Negotiable Instruments Act, 1881 ('Act' for short) would not arise in this case as it was not proved by the respondent-Bank that amount of consideration was paid to the appellant in lieu of execution of promissory notes. Learned counsel for the appellant further urged that the whole case was got up by the Bank against the appellant and, therefore, the appeal be allowed and the judgment and decree of the trial court be set aside.

8. Learned counsel for the respondent-Bank, Mr. Darshan Parikh, has vehemently submitted that the respondent-Bank had proved that the appellant had applied to the Bank for loan for his agricultural purpose and had executed promissory notes and other documents in presence

of attesting witnesses. Learned counsel for the respondent-Bank further submitted that the appellant in his deposition which was recorded in Special Case No.15 of 1977, had admitted that he had approached the respondent-Bank for obtaining loan for deepening of well situated on his agricultural land. Learned counsel for the respondent-Bank further submitted that the respondent-Bank had proved by leading cogent and reliable evidence that the appellant had executed promissory note and other documents at the time of obtaining loan for purchase of oil engine, construction of room and for deepening of well. Learned counsel for the respondent-Bank further submitted that the respondent-Bank had proved that there was valid execution of promissory notes. Presumption would arise in view of there being consideration for the same, and the burden is shifted to the appellant to prove that there was no valid consideration, which the appellant had failed to discharge in the trial court. Learned counsel for the respondent-Bank further submitted that books of account produced by the respondent-Bank had proved that loans were advanced to the appellant, for which, he had failed to make payments and, therefore, the appeal be dismissed with costs.

9. The evidence of the Officer of the respondent-Bank, Surendra Manilal Shah, who was at the relevant time serving as Agent at the Branch of the respondent-Bank, Palanpur, shows that he knew the appellant; that the appellant had taken application forms from the branch of Palanpur and had returned it duly filed along with extracts of pani-patrak of his lands. He deposed that, on receipt of the application with requisite papers, he had obtained information of the Bank's advocate Mr. K.D. Panchal and had requested him to draw a legal mortgage deed. He deposed that, after obtaining mortgage deed and title clearance certificate from the advocate, loans were sanctioned in favour of the appellant, and, accordingly necessary documents were executed, wherein, the appellant has put his thumb marks, which were attested by witness Bhagavatsingh, Agent of the Bank at Palanpur, who produced documents executed by the appellant, which was duly proved. The witness asserted that the appellant had put his thumb marks in all the documents in his presence and he had put identification writing by pencil on the said documents. The witness also produced during his deposition statement of accounts of the plaintiff loan account wherein outstanding dues as claimed in the plant were maintained. In cross examination, the witness admitted that the CBI

had filed a case against him and Arvind S. Trevedi for alleged loans sanctioned in favour of the agriculturists. The witness deposed that he had no knowledge as to who had filled in blanks in the application form submitted by the appellant. The witness categorically denied that a fictitious person by name, K.G. Panchal, was created as Advocate of the Bank to create forged documents for the purpose of dispersing loan in favour of adivasi agriculturists. The witness categorically denied during his cross examination that the appellant had not placed his thumb marks on pro-note in his presence. he denied that all the pro-notes were got up by him and Arvind Trivedi.

10. The evidence of witness, Parbatsingh Dungarji, Exh.78, discloses that he knew the appellant and the appellant had placed his left thumb mark on pro-notes Exh.36, 41 and 45. During his cross examination, the witness admitted that his eyesight was weak and because of weak eye sight, he could not recognize the appellant. He admitted that document Exh. 49 was not read over to anybody before thumb mark was placed by the appellant on the said documents. Evidence of Babubhai Shivram Patel, who was working as Clerk-cum-godown keeper in the respondent-bank's branch at Palanpur at the relevant time, shows that in documents in question, blanks were filled in by him and the appellant had put his thumb marks on the said documents in his presence. He further deposed that, below left thumb mark of the appellant, Agent of the Bank Surendra Shah had written name of Deepa Verma with pencil. Similarly he identified his hand-writing and deposed that in documents in question blanks were filled in by him. He further deposed that thumb mark of the appellant was taken by Agent Mr. shah in documents in question in presence of witness. This witness also identified photograph of the appellant on the pro-note produced at Exh.36. In cross examination, the witness deposed that the document with regard to loans are not prepared in place of Arvindkumar Trivedi. The witness emphatically deposed that the thumb marks of the appellant were taken in the Manger's cabin and at that time, Arvind Trivedi was also present. The witness denied suggestion that when thumb marks of the appellant were taken in the pro-notes, he was not physically present in the Bank.

11. Appellant, Dita Virma, in his deposition Exh.86, deposed that he had not purchased oil engine by taking loan from the Bank and he had not received any amount in cash from the Bank as alleged in the suit. He deposed that he had come to know about the loan transaction when

he learnt that amount is found due in his account. He further deposed that demand notices from the Bank were also received by Vaja Dhira and Chela Dhira of his village. He stated that, after receipt of notice, all three of them had gone to Amirgadh and had sent joint application to the Bank Officers and the Collector, Banaskantha. He stated that, after receipt of the application, the Bank Officers had conducted enquiry and he had made statement before the Officer that he had not taken any loan. It has come in his evidence that, after some time, police officers had come to his village and had recorded statements of himself, Vaja Dhira and Chela Dhira. He deposed that he had gone to Ahmedabad for giving evidence in Special Case No.15/97. According to the appellant, Arvind Trivedi had come to his village prior to 7 or 8 years before and had gather persons of his village and informed that the Government was giving money to farmers for purchase of engine, sinking well, etc. He deposed that writing for getting loan has been prepared at the shop of Arvind Trivedi. He emphatically stated that thumb marks of Vaja and Chela and his were taken in the shop of Arvind Trivedi. He stated that, the said writing, in which thumb marks were taken, were not original documents. It is stated by the appellant that, as promised by Arvind Trivedi, loan amounts were not paid to them. After some time, they had approached the Bank and informed the Officers present in the Bank that they had not received any amount of loan and the farmers did not want any money from the Bank. The appellant stressed that he had gone to the Bank only to inform the Bank Officer that they did not want loan from the Bank for purchase of oil engine, etc. During cross examination, the appellant deposed that he had not deposed in the Special Court or admitted that he had well in his agricultural land and he wanted to get it deepened and that he had applied for loan. He denied that he had taken loan for constructing a pucca well on his agricultural land. The appellant admitted in his cross examination that promissory notes in question were executed by him. His photograph was attached on pronote Exh. 36. The appellant also admitted that documents in question bore his thumb marks. The appellant denied that he had mortgaged his lands to the Bank for getting sanctioned loans. He denied that he has put thumb mark on the mortgaged deed and that he had gone to the Registrar's Office for executing mortgage deed. The appellant denied that Parbatsingh had put his signature in the mortgage deed. The appellant emphatically denied that he had taken loan for purchase of oil engine and for deepening of well on his lands. In short, the appellant, in cross examination, denied that he had applied for loan

and had received different amount of loan from the respondent-Bank. The appellant had also denied that he had mortgaged his agricultural land and oil engine as security for securing loan from the respondent-Bank.

12. The evidence of the respondent-Bank and its witnesses proves that the appellant had approached the Bank Manager and had applied for loans for the purpose of his agricultural operations and had mortgaged his agricultural land and oil engine with the Bank. The evidence of attesting witness, Parbatsinh Dungersinh (Exh.78), indicates that the appellant had put his left thumb marks on all the documents. He also identified thumb marks of the appellant and had deposed that all the documents were executed in his presence. Section 118 of the Negotiable Instruments Act, 1881, ('Act' for short) raises a statutory presumption in favour of there being consideration for every negotiable instrument. The presumption continues until it is rebutted and the only way it can be rebutted is by proving the contrary, viz., that the negotiable instrument was without consideration. The presumption that is raised under the section is not in respect of the consideration mentioned in the negotiable instrument but the presumption is in favour of there being a consideration for the negotiable instrument, any consideration which is a valid consideration in law. The appellant had failed to rebut presumption raised under Section 118 of the Act. The result is that there was valid consideration and the appellant had executed all the documents in lieu of the loan sanctioned in his favour. The Bank Manager and the attesting witness have no animosity against the appellant and they would not depose against the appellant. Once execution of all the documents was proved by the respondent-Bank, then it would not lie in the mouth of the appellant to contend that he had not applied for loan; had not received loan amount; and had not executed deed of mortgage with other documents. A baseless defence was raised by the appellant that he was duped by one Arvind Trivedi and, in fact, said Arvind Trivedi, who was hand in glove with the Bank officer, had pocketed loan amount. It may be stated that criminal proceedings were initiated against the Bank Officers and said Arvind Trivedi, but those proceedings have resulted into acquittal. Be that as it may, so far as civil liability of the appellant to clear bank dues is concerned, it is to be decided on the basis of evidence produced by the respondent-Bank against the appellant. Documentary evidence in the nature of promissory notes executed by the appellant, deed of mortgage and application for loan prove that the appellant had applied for different

amounts for carrying out agricultural operations. Promissory notes also establish that the appellant had received loan amount. The evidence of the Bank Officer and the attesting witness also support the Bank's case that the appellant had executed all the documents which were duly attested by the witness. In any case, the learned trial judge had properly appreciated oral as well as documentary evidence and committed no error in decreeing the suit filed by the respondent-Bank. Admittedly, the appellant had not repaid amount of different loan as agreed. I do not find any infirmity or error in the findings and conclusion arrived at by the trial court.

13. As a result of foregoing discussion, this appeal is dismissed with no order as to costs.

(swamy)